IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.2404 OF 2004

IN

SUMMARY SUIT NO.3164 OF 2001

Dev Shah Corporation. ... Plaintiffs.

vs.

Shree Ram Mills Ltd. ... Defendants.

Ms.M.V.Thakkar i/b. Haridas & Co., for Plaintiffs.

Mr.Gaurav Joshi i/b. Little & Co. for Defendants.

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CORAM: D.K.DESHMUKH,J.

DATED: 17th June,2005

P.C.:-

1. This is a Notice of Motion taken out by defendants for setting aside the order dated 3rd June,2003 passed in Summons for Judgment no.113 of 2001 and the judgment and decree dated 6th February,2004. The plaintiff had filed a Summary suit. In that

summary suit, summons for judgment was taken out. It appears that the summons for judgment was decided by order dated 3rd June,2003. Perusal of the order dated 3rd June,2003 passed in Summons for Judgment shows that the order has been passed on merit after considering the reply filed by the defendants. Therefore, I do not find any reason to set aside the order dated 3rd June,2003 passed in Summons for Judgment. By that order, conditional leave was granted to the defendants on the condition that he has to deposit Rs.5,94,500/- within a period of four weeks. The said amount was not deposited, as a result there was no leave to defend the suit granted and hence, the suit was listed for ex-parte decree and ex-parte decree was passed. The execution was taken out and at this stage the present notice of motion has been taken out. In this Notice of Motion, ad-interim order has been made on 30.8.2004 and the warrant of attachment on the property issued in execution, has been stayed by the Court on depositing the amount of Rs.21,91,675/-. That amount is lying in deposit in this Court. Therefore, really speaking what is to be considered in this matter is "whether the defendants are to be granted extension of time to deposit the amount which was fixed by order dated 3rd June,2003 ?" By order dated 3rd June,2003, the defendants were granted four weeks time to deposit the amount of Rs.5,94,500/-. The defendants have deposited the amount of more than Rs.21 lakhs pursuant to order dated 30th August,2004, in September,2004. Thus,

there is delay in depositing the amount of more than 12 months. In my opinion, though the reasons that have been given for not depositing the amount within the time granted and for not remaining present on the date on which the decree is passed and the summons for judgment is decided, cannot be said to be sufficient. However, in my opinion, as the decree which is passed is an ex-parte decree and as the Court by order dated 3rd June,2003 has found that the defendants have some defence to offer and therefore, conditional leave to defend the suit was granted, the defendants would be entitled to extension of time to deposit the amount though subject to certain conditions so that the defendants get an opportunity to defend the suit. In my opinion, therefore, following order would meet the ends of justice:-

(i) The delay in depositing the amount directed to be deposited by order dated 3rd June,2003 is condoned, subject to payment of cost of Rs.15,000/- The payment of cost be made within a period of two weeks from today.

(ii) On the cost being paid, the Prothonotary and Senior Master of this Court shall permit the defendants to withdraw the amount deposited by the defendants pursuant to order dated 30.8.2004, after retaining the amount of Rs.5,94,500/-. It is made clear that defendants are to be permitted to withdraw the amount of Rs.21,91,675/- minus Rs.5,94,500/-.

(iii) The Prothonotary & Senior Master of this Court shall permit the plaintiffs to withdraw the amount of Rs.5,94,500/- remaining in balance on furnishing Bank guarantee to the satisfaction of the Prothonotary & Senior Master of this Court.

(iv) In case the plaintiffs fail to withdraw the amount after furnishing bank guarantee within a period of Six weeks from today, the Prothonotary & Senior Master of this Court shall invest that amount in fixed deposit in a nationalised Bank during the pendency of the suit.

(v) Ex-parte decree passed in the suit is set aside.

The defendants are granted four weeks time to file written statement. Notice of Motion disposed of.